1988

Redevelopment Agency of Salt Lake City v. Ellen K. Daskalas, Terry Panelakis, Juanita Irene Burge, Robert D. Barrows, Jr., Beatrice Irene Barrows : Petition for Rehearing

Utah Court of Appeals

Harold A. Hintze; Olsen, Hintze, Nelson, and Hill; Williams D. Oswald; Brent Wall; Wall and Wall; Attorneys for Respondent.
John T. Evans; Dart, Adamson, and Kasting; B. Ray Zoll; Jerome H. Mooney; Kyle Treadway; Attorneys for Appellants.

IN THE UTAH COURT OF APPEALS

------oooo0oooo-----

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff, v. ELLEN K. DASKALAS, an individual d/b/a the Pawn Shop, a Utah corporation; and TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans, Defendants and Appellants, and JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al., Defendants and Respondents.	Case No. 880302-CA
REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff and Respondent, v. JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, ELLEN K. DASKALAS, an individual d/b/a The Pawn Shop; THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a Jim's Ribs; TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans and Sales, Inc., a Utah corporation, Defendants and Appellants.	Case No. 880292-CA

PETITION FOR REHEARING

Harold A. Hintze
OLSEN, HINTZE, NELSON & HILL
Attorneys for Plaintiff/
Respondent Redevelopment
Agency of Salt Lake City
3319 No. University Ave., #200
Provo, Utah 84604
Telephone (801) 359-3510

William D. Oswald
Attorney for Plaintiff/
Respondent Redevelopment
Agency of Salt Lake City
57 West 200 South, #500
Salt Lake City, Utah 84101
Telephone (801) 521-7751

Brent Wall
Wall & Wall
Attorneys for Defendants
Daskalas, The Pawn Shop,
and Pantelakis
800 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone (801) 521-8220

John T. Evans
DART, ADAMSON & KASTING
Attorneys for Appellants/
Defendants Burge,
Barrows, and Barrows
310 South Main St. #1330
Salt Lake City, Utah 84101
Telephone (801) 521-6383

B. Ray Zoll
Attorney for neighboring
owners
5251 S. Green Street, #205
Salt Lake City, Utah 84123
Telephone (801) 262-1500

Jerome H. Mooney
Kyle Treadway
Attorneys for Defendants
Daskalas, The Pawn Shop,
Anderson, and Pantelakis
236 South 300 East
Salt Lake City, Utah 84111
Telephone (801) 364-5635

IN THE UTAH COURT OF APPEALS

------oooo0oooo-----

REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff, v. ELLEN K. DASKALAS, an individual d/b/a the Pawn Shop, a Utah corporation; and TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans, Defendants and Appellants, and JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, et al., Defendants and Respondents.	Case No. 880302-CA
REDEVELOPMENT AGENCY OF SALT LAKE CITY, a public entity, Plaintiff and Respondent, v. JUANITA IRENE BURGE; ROBERT D. BARROWS, JR.; BEATRICE IRENE BARROWS, ELLEN K. DASKALAS, an individual d/b/a The Pawn Shop; THE PAWN SHOP, a Utah corporation; JAMES ANDERSON, an individual d/b/a Jim's Ribs; TERRY PANTELAKIS, an individual d/b/a Jewelers & Loans and Sales, Inc., a Utah corporation, Defendants and Appellants.	Case No. 880292-CA

PETITION FOR REHEARING

The Defendants and Appellants Burge, Barrows and Barrows, by and through their attorney of record, John T. Evans, hereby petition the Court for a rehearing in connection with the Opinion of the Court in the above-entitled matters filed on October 11, 1989, as to issues I and III set forth in such Opinion, as follows:

POINT I

THE COURT SHOULD CONSIDER SPECIFIC PROVISIONS IN THE STIPULATION AND THE MATERIALITY OF POSSESSION IN DETERMINING WHETHER INTEREST SHOULD BE PAID.

In the discussion beginning on page 8 of the Court's Opinion as to the issue of the payment of interest on funds deposited with the Court, the Court concludes that the owners should receive no interest because the RDA did not receive possession. In other words, the taking of actual possession was the consideration for the payment of interest.

In arriving at its conclusion, the Court compares the stipulation with Utah Code Anno. Section 78-34-9 (1987) (herein "Section 9") and seems to conclude that since their purpose and requirements closely parallel each other, the parties must have intended that the stipulation be interpreted in accordance with the provisions of Section 9. The Court seems to reason that Section 9 does not provide for interest to accrue until possession is transferred, therefore the parties must have intended that their stipulation so provide.

The Court, however, should not overlook the fact that (1) the terms of the stipulation show no relationship between payment of interest and possession; and (2) even if possession was

consideration for the payment of interest, interest should be paid because possession was not material.

1. This Court agrees that "the document at issue is an agreement, stipulated to by the parties." (Opinion at page 8.) Inasmuch as we are interpreting an agreement entered into between the parties, the Court should look at the actual provisions of the stipulation to determine the intent of the parties.

The terms of the stipulation contemplate the payment of interest without transferring possession. Although the intent of the stipulation is to accomplish the same purpose as that of a Section 9 order, i.e., to establish the terms for obtaining possession, the issue before this Court, however, is to harmonize the terms within the stipulation, not to determine what are the terms of Section 9. If anything is obvious from the agreement, it is that the parties intended to deviate from the provisions of Section 9. The stipulation requires a 100% deposit of the appraised value instead of 75% required by Section 9, the stipulation requires the owners to give up their right to contest RDA's power of condemnation if the ADL is signed with Lincoln, not just when funds are withdrawn as provided in Section 9, and the stipulation provides for interest to run at a rate of 11 1/2% instead of the 8% provided for in Section 9.

That the payment of interest was consideration for the <u>right</u> to receive possession and not <u>actual</u> possession, is evident from other important provisions in the stipulation overlooked in the Opinion that deviate from 78-34-9, as follows:

(a) In the first place, the stipulation is silent as to a consideration that would pass to the owners for their promise to give up possession. If the payment of interest was consideration for actual possession, what was the consideration for the owners' promise to give up their defenses to plaintiffs right to take? It is obvious that the owners gave up their legal defenses by giving the plaintiff the right to take possession when entering into the ADL. The right to assert these defenses were valuable rights which the owners gave up by their promise, and it was that promise that was all the RDA really wanted or needed. The opinion acknowledges that the stipulation is a contract. It does not matter whether the label put upon the terms is that of "option" or something else. The fact is that the owners' promise to abandon their defenses is a valuable consideration going to the RDA even absent any actual transfer of possession. No other consideration for such promise is provided in the stipulation other than the payment of interest, and the Opinion overlooks what consideration passed for the owners' promise. If the payment of interest was not the consideration, then the RDA got everything it wanted (assurance given to Lincoln of its power to condemn) and gave up nothing to get that assurance.

(b) The payment of interest under the stipulation accrues only against those funds being held on deposit with the Clerk, whereas under Section 9, no interest is paid on the funds on deposit. The Court's Opinion does not address the fact that a ruling that the payment of interest is consideration only for actual possession, creates a contradiction. This is because

without the ADL being signed, actual possession could only be transferred by the act of withdrawing funds from the Clerk. The very funds being withdrawn are the funds on which interest is to be running. The incongruity is obvious. To earn interest, the funds must be withdrawn, but any funds withdrawn will not earn interest. It is analogous to a bank stating that I will pay you a higher rate of interest on money on your savings account so long as you do not keep any funds in that account. To interpret the stipulation as stating that the RDA promised to pay interest on the funds on deposit only if those funds are withdrawn, is an illusory promise. The fact that interest is to be paid only on such funds on deposit points out that the extent of the stipulation was for the RDA to provide for interest payments without receiving actual possession.

(c) Section 9 interest begins accruing from the time actual possession is transferred which time shall be fixed by the Court. The stipulation provides, however, that interest shall begin running before the RDA takes possession and no time is fixed for the transfer of possession even though interest is still accruing. This shows there is no relationship between the time interest is to begin running and the time possession is to be received. Section 1(a) of the Stipulation provides that interest shall accrue from August 16, 1985, when the promise (option) was entered into and the funds were deposited, not on the date possession was to be transferred. It was never contemplated by the parties that actual possession shall commence on August 16, 1985.

(d) The stipulation also provides that the interest held by the Clerk can be withdrawn without waiving the owners' defenses to the taking. Withdrawal under Section 78-34-9, however, would constitute an abandonment of the owners' right to contest RDA power to obtain possession. Under the stipulation, possession will be transferred only when the deposit of $275,220.00 is withdrawn, not when they withdrawn the interest earned thereon. Referring to the deposited amount of $275,220.00, paragraph 1(a) states: "The withdrawal of all or any part of said deposited funds by . . . (owners) shall constitute a waiver of any and all defenses to the taking. . . ." (Emphasis added.) Paragraph 1(e) likewise states that the plaintiff may not begin "collecting rent . . ." until the owners "have . . . withdrawn part or all of the $275,220.00 deposited with the clerk. . . ."

These provisions are not addressed by the Court in its Opinion. Had possession been a condition for receiving interest payments, the contract would have provided for the transfer of possession upon the withdrawal of interest.

2. Interest should at least be awarded after off-setting rents received. The RDA did not need nor want actual possession. The project proposed by Lincoln was still in its preliminary stages and no design or projected use for the property had yet been finalized. Construction was months or years away as it effected the subject property.

All that the RDA needed or wanted was to be able to demonstrate to the satisfaction of Lincoln that the RDA had the

right to obtain possession when needed. The only thing that the RDA needed was the owners' promise to give possession, which promise (option) was received when the stipulation was entered into. At that moment, the RDA received the benefit for which consideration had to pass to the owners in the form of the promised interest.

Therefore, if the Court remains of the opinion that actual possession was a condition to the payment of interest, then it should rule that possession was a condition not material to the RDA. Even though possession did not take place, such non-occurrence of possession should not relieve the RDA of its duty to pay interest in full as required under the terms of the stipulation, less the cost of what was not performed, which in this case, would be an offset for the benefit to the plaintiff of the net rent the RDA should have received had possession been given. (6 Corbin on Contract Section 1370 (1962)).

The RDA has agreed to pay this difference as set forth on page 10 of its Brief stating: "The RDA is willing either to have the order nun pro tunc effective and pay the interest agreed to, but with the attendant right to receive possession of and income from the property." This would alleviate any injustice to the owners, who were led to believe that interest continued to accrue to their benefit without the need to give up possession of the property, and who were prevented from withdrawing the funds as hereafter discussed.

The owners were unable to transfer possession by the

withdrawal of funds. On page 12 of the Court's Opinion, it notes that the "owners during the approximately 85 days the funds deposited with the Court remained unfrozen, never withdrew any of the funds." It should be remembered that the owners were not able to withdraw those funds because within one week of the entry of the stipulation, the tenants filed their Answer and Objection to the stipulation claiming the right to the whole thereof. Tenants' Objection to Order filed on August 23, 1985, asserted a right under the lease agreement to share in the proceeds to be awarded. Although the actual "freeze" was not ordered until November 1, 1985, it would not have been appropriate for the owners to withdraw those funds on deposit, given the tenants' claim thereto.

3. The agreement satisfies the requirements of an option. On page 12 of the Court's Opinion, it defines an option contract as a "promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer." It is not clear whether the Opinion misapprehends whether the stipulation does not comply with the requirements of an option. Certainly it is not mutually exclusive to have a stipulation that can also incorporate option terms. There is no question but what we have a stipulation that complies with the requirements for the formation of a contract. There is also no question that the stipulation by its terms limits the power of the owners to revoke or back out of their promise to grant possession and give up any and all defenses against the RDA's right to condemn if Lincoln and RDA enter into their ADL. In entering into the stipulation, the

owners gave the RDA an exclusive right to acquire the property which the owners could not thereafter revoke. The requirements of an option are complied with.

If the Court is stating its opinion that the agreement does not meet the definition of an option, this should be clarified.

In conclusion, rehearing should be granted to allow this Court to give full consideration to the contract provisions which show that no relationship exists between the payment of interest and the awarding of actual possession, but if this Court concludes otherwise, it should determine that actual possession was not a material condition and that interest should be awarded after allowing an offset for rents received, which amount should be determined by the trial court upon remand.

POINT II

IN DETERMINING WHAT COSTS MAY BE AWARDED, THE COURT SHOULD ADDRESS THE MEANING OF THE ACTUAL WORDING OF UTAH CODE ANNOTATED SECTION 11-19-23.9 (1986).

In the Court's discussion of issue III, beginning on page 16 of the Opinion, it concludes that since Section 11-19-23.9 does not expressly provide for compensation for expert witnesses, "costs" should be defined as meaning taxable court costs as provided by Rule 54(d)(1). The Court overlooks the fact that such interpretation would be (1) inconsistent with the meaning of "costs" as used elsewhere in the same Section, (2) not give meaning to the word "including" as provided in the Section, (3) not be consistent with the fact that under this section the award of costs

is discretionary with the court.

1. The Court has failed to address the fact that the word "costs" is used twice in Section 11-19-23.9. The statute also authorizes an award for "costs and expenses, if any, of relocating the owner." Unless the legislature intended two separate definitions of the same word used in the same act, the legislature did not intend that "costs," be limited to the narrow definition of taxable court costs. The term should be given a consistent interpretation unless the legislature indicates otherwise. To give harmony to the meaning of "costs" as used in both sentences in the section, it should appear that the legislature intended "costs" in the sense of reimbursement to the owner for expenses necessarily incurred. It is not enough to say that just because the legislature did not define costs, it must have meant "taxable court costs." "Costs" should be interpreted so as to harmonize with the use of the term throughout the statute.

2. The Opinion fails to attach any meaning to use of the work "included." On page 20 of its Opinion, the Court states that "Section 11-19-23.9 authorizes compensation for costs and attorneys fees. . . ." (Emphasis added.) This is a very critical misstatement of what is authorized by that Section. The Court has in fact interpreted that Section as though it did authorize costs "and" attorneys fees, but in fact, the Section authorizes "costs, including a reasonable attorneys fee." (Emphasis added.) The use of the word "including" is not synonymous with "and." The Court fails to address that distinction, but simply interprets the

provision as though "including" were nowhere to be found in the statute, nor does the Court give any reason as to why it feels that "including" should have the same meaning as the word "and."

"Including" denotes that attorneys fees are a part of the meaning of the term "costs," hence extending the definition and the meaning of costs beyond the narrow definition of taxable court costs.

3. The legislature would not have made the statute permissive if it intended that "costs" meant taxable court costs. The Court correctly points out on page 19 of the Opinion that Section 11-19-23.9 is permissive and discretionary with the Court, i.e., the Court "may" award costs. This is further indication that the legislature did not intend the costs to be limited to taxable court costs under Rule 54(d)(1), inasmuch as such taxable costs are not discretionary with the Court. The legislature must have intended that such costs being so authorized were those types of costs that were discretionary costs and not the mandatory court costs. The Court seems to have overlooked this inconsistent result in its Opinion and this should be addressed by the Court to make a full and complete determination of the meaning of the statute.

The Opinion, as presently rendered by the Court, does not address either the meaning of "including" as set forth in the statute, nor does it attempt to give harmony to the term "costs" as used elsewhere in the statute nor does it explain the effect of making the awarding of Rule 54(d)(1) costs discretionary. The literal meaning of those provisions and terms should be given

effect and not overlooked by the Court. The owners are not arguing that the constitution so requires, but simply that the legislature has so intended.

I certify that the foregoing petition is in good faith and not for delay.

Dated this 24th day of October, 1989.

DART, ADAMSON & KASTING

_____

John T. Evans
Attorneys for Defendants/
Appellants

CERTIFICATE OF SERVICE

I hereby certify I caused four true and correct copies of the Appellants Petition for Rehearing to be mailed to the following counsel of record on the 24th day of October, 1989:

Harold A. Hintze
OLSEN, HINTZE, NELSON & HILL
Attorneys for Plaintiff/
Respondent Redevelopment
Agency of Salt Lake City
3319 No. University Ave., #200
Provo, Utah 84604
Telephone (801) 359-3510

William D. Oswald
Attorney for Plaintiff/
Respondent Redevelopment
Agency of Salt Lake City
57 West 200 South, #500
Salt Lake City, Utah 84101
Telephone (801) 521-7751

B. Ray Zoll
Attorney for neighboring
owners
5251 S. Green Street, #205
Salt Lake City, Utah 84123
Telephone (801) 262-1500

Brent Wall
Wall & Wall
Attorneys for Defendants
Daskalas, The Pawn Shop,
and Pantelakis
800 Boston Building
9 Exchange Place
Salt Lake City, Utah 84111
Telephone (801) 521-8220

Jerome H. Mooney
Kyle Treadway
Attorneys for Defendants
Daskalas, The Pawn Shop,
Anderson, and Pantelakis
236 South 300 East
Salt Lake City, Utah 84111
Telephone (801) 364-5635